

**Grande Mela Corp. d/b/a Paper Moon Milano and Raffaele Federico.** Case 2-CA-25616

November 23, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On July 12, 1993, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Grande Mela Corp. d/b/a Paper Moon Milano, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We note that although the judge's remedy provides that the discriminatee, Federico, be made whole for any loss of earnings "from the time of his discharge" to the date of the Respondent's offer of reinstatement, it inadvertently fails to specify that Federico is entitled to backpay for both the period following his first discharge on January 20, 1992, and the period following his second discharge on March 5, 1992. We modify the judge's remedy accordingly.

*Nancy Schneider* and *Larry Singer, Esqs.*, for the General Counsel.

*Robert Ferrari, Esq.*, of Astoria, New York, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on March 24, 1993. Upon a charge filed on March 10, 1992, a complaint was issued on July 30, 1992, alleging that Grand Mela Corp. d/b/a Paper Moon Milano (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices. At the hearing the General Counsel moved to keep the record open pending review of

the charge filed on March 23, 1993, in Case 2-CA-26465. Respondent opposed the General Counsel's motion. On April 20, 1993, after reviewing memorandum submitted by counsel for the parties I denied the General Counsel's motion and closed the record.<sup>1</sup>

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a New York corporation with its principal office and place of business in New York City, operates a restaurant. It annually derives gross revenues in excess of \$500,000 and purchases and receives at its facility materials and services valued in excess of \$50,000 directly from suppliers located outside the State of New York. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find that Hotel Employees and Restaurant Employees Local 100, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

*A. The Facts*

**1. Background**

In September 1991, the Union commenced an organizing campaign among Respondent's employees. Emilio Capocci,<sup>2</sup> a former waiter, appeared to me to be a credible witness. He credibly testified that during October 1991 he distributed approximately 20 union authorization cards to the employees. He testified that Raffaele Federico, another waiter, spoke to the kitchen help and busboys concerning the Union. At the same time the employees signed a statement requesting Respondent to recognize the Union. Federico credibly testified that he obtained approximately five to seven signatures on this statement. On October 30, 1991, the Union filed a petition with the Board in Case 2-RC-21100 requesting that it be certified as the collective-bargaining representative of Respondent's employees. A meeting was held in November between Franco Caselli, Respondent's general manager, and the employees. Capocci credibly testified that Caselli asked the employees "why did we go to the union." The employees told Caselli that they were concerned about medical insurance and other benefits. Capocci credibly testified that Caselli said "he would do something about the medical insurance and everything else." Federico corroborated the testimony. Caselli conceded that he asked the employees at this meeting "why did you go the Union and not come to me first." Caselli also testified that he told the employees "in-

<sup>1</sup> My order is included in the record as ALJ Exh. 1.

<sup>2</sup> The General Counsel has moved to correct p. 116 of the transcript to indicate that Capocci testified that his employment ended in March 1993. My notes indicate that he testified that his employment ended in March 1992. Accordingly, the General Counsel's motion is denied.

stead of going to the Union if you have any problems why don't you come to me first." On January 2, 1992, a representation election was conducted at which time Federico acted as an observer on behalf of the Union. The Union lost the election.

## 2. Discharge of Federico

Federico credibly testified that during October and November he received permission from Andrea Moore, the assistant manager, to take a vacation beginning January 3, 1992. Federico further testified that in December he met with Caselli and told him about the vacation. Caselli told Federico "I don't know anything about your vacation." Federico testified that he then asked Andrea about the vacation and she replied "at this point things have changed because of the union." Federico's testimony was not controverted. Caselli conceded that he told Federico "if you want to go on vacation go on vacation."

Federico returned from vacation on January 18, 1992. Upon his return he called Andrea to ask about his schedule for the following week. Andrea told him to come to the restaurant and speak to Caselli on January 20. Federico came to the restaurant on January 20 and he credibly testified that Caselli told him "I told you not to go on vacation." Respondent has admitted that it discharged Federico on January 20. On January 21 Shayna Moore, the new assistant manager, telephoned Federico and told him that he was scheduled to go back to work the following Monday, January 27. This was confirmed by Caselli and Federico did, in fact, return to work on January 27.

## 3. Second discharge of Federico

Caselli testified that towards the end of February 1992 the waiters complained that they wanted to work 5 days instead of 4-1/2 days. Caselli had a meeting with the waiters and he testified that he told them "if business does not improve and you guys want to work five days or more days or more hours, somebody has to go." Caselli testified that business did not improve during the next several weeks and he decided that he had to fire one waiter. The waiter he decided to discharge was Federico. He testified that he chose Federico because he was the "worst" waiter.

## B. Discussion and Conclusions

### 1. Interrogation and promise of benefits

The complaint alleges that during November Respondent interrogated employees and promised them medical benefits in order to persuade them not to select the Union as their bargaining representative. The complaint also alleges that in December Respondent interrogated employees concerning their activities on behalf of the Union. I have credited Capocci's testimony that in November a general meeting was held between Caselli and all of the employees. Caselli asked the employees "why did we go to the union." Some of the employees replied that they were concerned about medical insurance and other benefits. Caselli told the employees that he would "do something about the medical insurance and everything else." A number of the employees at the meeting were not known by management to be union supporters. After reviewing all of the circumstances I believe that

Caselli's question to the employees as to why they wanted a union was an unlawful interrogation and violation of Section 8(a)(1) of the Act. See *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In addition an employer violates Section 8(a)(1) of the Act when it promises benefits to employees to dissuade them from seeking union representation. See *Sewell Allen Big Star*, 294 NLRB 312, 315 (1989). I believe that Caselli's response to the employees that "he would do something about the medical insurance and everything else" constituted an unlawful promise of benefits in violation of Section 8(a)(1) of the Act.

Federico also testified that in December Caselli approached him in the dining room during lunchtime and told him "you want the Union don't you and if you want the Union you must be against the Employer." Federico was an open and active union supporter and the conversation took place in the dining room during lunchtime with other employees passing by. Under the circumstances I do not believe that Respondent engaged in an unlawful interrogation. See *Rossmore House*, *supra*; *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Raytheon Co.*, 279 NLRB 245, 246 (1986).

## 2. Discharges of Federico

During the fall of 1991 during the organizing campaign Federico spoke to the waiters and busboys concerning the Union and he obtained approximately six signatures for the petition requesting recognition. He was the observer on behalf of the Union at the election held on January 2. On January 20 Federico was discharged. I believe that the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to discharge Federico on January 20.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), once a *prima facie* showing has been made, the burden shifts to the employer to demonstrate that "the same action would have taken place even in the absence of the protected conduct." Respondent maintains that Federico was discharged on February 20 because he took an unauthorized vacation. I have credited Federico's testimony that in the fall of 1991 he received permission from Andrea, the assistant manager, to take a vacation beginning January 3, 1992. In addition, Caselli conceded that he told Federico "if you want to go on vacation go on vacation." I find that Respondent has not sustained its burden under *Wright Line*, and accordingly by discharging Federico on January 20 Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

Federico returned to work on January 27 and Respondent again discharged him on March 5. Respondent maintains that during February it did not have sufficient business to be able to keep the waiters on full-time and therefore it had to discharge one waiter. Caselli testified that he chose Federico as the waiter to be discharged because he was the "worst" of all of the waiters. The record shows that for the weeks ending February 16, 23, and 29, 1992, the waiters all worked 40 hours weekly plus overtime. While Caselli testified that Federico was the "worst" waiter, he in fact rehired him after his first discharge on January 20. While Caselli testified that

he disciplined Federico throughout his entire employment, Federico, in fact, was not discharged until after he had served as the observer on behalf of the Union and after the union election. See *Middle Earth Graphics*, 283 NLRB 1049, 1058 (1987). In addition, Respondent's answer alleges that on March 5 Federico was "laid off" but not discharged. Yet the record shows that several months after Federico's termination an additional waiter was hired and Federico was not recalled. For the above reasons, I find that Respondent has not sustained its burden of showing that the "same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089. Accordingly, by discharging Federico on March 5 Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about their union activities and by promising them benefits if they rejected the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Raffaele Federico for his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Raffaele Federico in violation of the Act, I find it necessary to order Respondent to offer him full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings that he may have suffered from the time of his discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>3</sup>

On the foregoing findings of fact, conclusions of law, and on the entire record, I issue the following recommended<sup>4</sup>

<sup>3</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>4</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### ORDER

The Respondent, Grande Mela Corp. d/b/a Paper Moon Milano, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities and promising them benefits if they reject the Union.

(b) Discharging employees for activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Raffaele Federico full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings, with interest, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of Federico and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amounts owing under the terms of this Order.

(d) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint to which no violations have been found are dismissed.

<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees concerning their union activities and promise them benefits if they reject the Union.

WE WILL NOT discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Raffaele Federico full reinstatement to his former position or, if such position no longer exists, to a sub-

stantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Federico and notify him in writing that this has been done and that the discharge will not be used against him in any way.

GRANDE MELA CORP. D/B/A PAPER MOON  
MILANO